

Suthan a/l Mookaiah & Anor v Zed Mobile Malaysia Sdn Bhd & Anor A

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS B
NO WA-24NCC-220-06 OF 2020
WAN MUHAMMAD AMIN JC
7 MARCH 2022

Civil Procedure — Affidavits — Defective affidavits — Plaintiffs raised preliminary objection that defendants' affidavits were defective pursuant to O 41 r 12 of the Rules of Court 2012 — Whether preliminary objection was an afterthought as it was raised at the last minute — Rules of Court 2012 O 41 r 12 C

Civil Procedure — Parties — Non-joinder of party — Whether plaintiffs failed to name appropriate party D

Companies and Corporations — Meetings — Validity — Validity of notices of requisition, notices of extraordinary general meeting and resolutions passed by sole shareholder of companies — Whether appointment of corporate representative by sole shareholder was valid — Whether mandatory requirements under Companies Act 2016 for convening of extraordinary general meeting and removal of directors were complied with — Whether any non-compliance of mandatory requirements rendered extraordinary general meeting and removal of directors invalid — Companies Act 2016 ss 311(2), (3), 312(1), 313(1), 316, 333 & 582 E F

The plaintiffs were the directors of the defendants whereas a Spanish company known as Zed Worldwide Holdings SL ('Zed Worldwide') which had been declared insolvent were the sole shareholder of the defendants. Zed Worldwide's shares in the defendants were subsequently acquired by a company known as Newry Global Media SLU and this acquisition was confirmed by an individual by the name of Jordi, the insolvency administrator of Zed Worldwide. Vide two certificates of authorisation under s 333 of the Companies Act 2016 ('the CA 2016'), Zed Worldwide had appointed Felix Sanchez Echevarria ('Felix') and subsequently Chan Min En ('Chan') as its corporate representatives but eventually, Chan resigned. Zed Worldwide had also appointed Felix as the additional director of the defendants and subsequently removed the plaintiffs as the directors of the defendants. In the present originating summons ('the OS'), the plaintiffs sought to invalidate the notices of requisition, notices of extraordinary general meeting ('EGM notices') and the resolutions passed by Zed Worldwide ('encl 1'). In addition, the plaintiffs had also filed notice of application for various injunctive relief in G H I

A encl 3. The plaintiffs had raised preliminary objection ('the PO') that all the
defendants' affidavits filed in this OS were defective pursuant to O 41 r 12 of
the Rules of Court 2012 ('the ROC'). This was premised on the fact that the
defendants' affidavits were affirmed before a notary public in Spain and Spain
B was not a Commonwealth country, as such, the defendants should have
affirmed the affidavits before a consular officer of a Commonwealth country in
Spain. The issues raised in the present action were: (a) whether Jordi appointed
Felix as Zed Worldwide's corporate representative and the issue of Felix's
authority; (b) whether the second defendant had complied with the mandatory
C requirements as required by the CA 2016 in convening the EGM and
removing the plaintiffs as the directors; and (c) whether any non-compliance
rendered the convening of EGM and removal of the plaintiffs invalid. In
addition to the above issues, the court had also considered the issues regarding
the failure to include Zed Worldwide as a party in the present action and
D regarding the conflicting mandates in appointing new board of directors ie
between Felix and Chan. Finally, the court concluded the case with an
examination of the main issue regarding the reasons why Zed Worldwide
resorted to removing the plaintiffs as the directors of the defendants and the
manner in which the plaintiffs were removed which went to the core question
E of the validity of Felix's appointment as corporate representative.

Held, dismissing encls 1 and 3 with costs of RM18,000:

- (1) The PO was indeed an afterthought raised at the last minute which was
not only unfair to the defendants but was something the defendants
F could have easily remedied if it was raised at the earliest moment. By
failing to give notice of the PO at the earliest moment the plaintiffs were
deemed to have waived their right to do so. The non-compliance to the
ROC did not cause or result in a substantial miscarriage of justice. The
court therefore dismissed the plaintiffs' PO and granted leave to the
G defendants to use all the defendants' affidavits despite the defect
complained of by the plaintiffs (see paras 53–54).
- (2) The plaintiffs themselves had specifically challenged Felix conduct acting
on behalf of Zed Worldwide. Further, the defendants were mere nominal
H defendants and the requisitioner of the EGMs was Zed Worldwide, as the
sole shareholder. The reliefs sought in the present action were in fact
against Zed Worldwide itself. Therefore, Zed Worldwide should have
been made a party to this OS (see paras 59 & 61–63).
- (3) Two letters were issued by Jordi ie on 8 April 2020 and 14 April 2020. In
I both letters, Jordi confirmed, among others, Felix's authority as Zed
Worldwide's corporate representative in the defendants and Chan's
appointment did not supersede Felix's appointment. In respect of the
authenticity of the letters, the defendants had produced the digital
signature certificates attached to the letters. Further, the plaintiffs could

not show any contrary evidence to suggest that the letters were unsigned. It was clear that Jordi appointed Chan in addition to Felix as Zed Worldwide's corporate representative and that the second certificate of authorisation did not supersede or revoke Felix's appointment. As such, there was no necessity for Jordi to issue a new certificate appointing Felix again (see paras 78–79 & 84–85).

- (4) In relation to the issue of conflicting mandates, firstly, the former company secretary did not give any effect to the member's written resolutions passed by Zed Worldwide (acting through Chan), as such, the issue was purely academic. Secondly, since Jordi had validly appointed Felix as Zed Worldwide's corporate representative, Felix had the requisite authority to pass the member's written resolutions on behalf of Zed Worldwide. More importantly, these resolutions were only passed after Chan's resignation. Therefore, there could not be any conflicting mandates (see paras 92–93).
- (5) In respect of the issue regarding the failure of the second defendant to comply with the statutory requirement, the court found that this issue was not pleaded in any of the plaintiffs' affidavits and only raised by way of submissions. On this ground alone, the plaintiffs' argument ought to be rejected. In any event, the court found that the plaintiffs were aware of Zed Worldwide's intention to pass the resolutions to remove them as directors. Hence, there was no surprise and/or prejudice occasioned to the plaintiffs. Since the plaintiffs had sufficient notice of the EGM, the purported non-compliances were merely irregularities that the court could cure. Further, there was no allegation on affidavit that the EGM notice was short served let alone that it was deliberate, therefore the fact that it was short served could not invalidate the EGM or nullify the resolutions passed thereat (see para 101).
- (6) The 'unanimous consent rule' or '*Duomatic* rule' in *In Re Duomatic Ltd* [1969] 2 Ch 365 was applicable in that if all directors or shareholders agreed to a particular course of conduct or transaction which was honest and intra vires the company, the matter done would be upheld, notwithstanding the fact that the matter was not done in the required form. Zed Worldwide was the sole legal shareholder of the defendants and since the EGM was requisitioned by the shareholder, it was up to the shareholder to waive or accent to any irregularities for lack of notice or short notice. Even if there were any irregularities, the court may cure them under s 582 of the CA 2016. In fact, in the present case, there was no necessity to cure the irregularity as it did not cause substantial injustice or any injustice (see paras 102–106).
- (7) The requisition notices were issued by Felix on behalf of Zed Worldwide, as such, such notices were properly issued in accordance with s 311(2) of the CA 2016. Zed Worldwide also held 100% shareholding in the

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- A defendants as required under s 311(3), therefore, pursuant to s 312(1) of the CA 2016, the plaintiffs were obliged to call for a meeting of members within 14 days from the date of the requisition. Due to the plaintiffs' failure to call the meeting, Zed Worldwide was entitled under s 313(1) of the CA 2016 to resort to the self-help provision to convene members' meeting to pass the resolutions. Zed Worldwide then issued the EGM notices with 14 days' notice period in accordance with s 316 of the CA 2016 and art 60 of the first defendant's constitution. Finally, Zed Worldwide had passed the resolutions to remove the plaintiffs as directors of the defendants. Zed Worldwide held 100% shareholding in the defendants and had the absolute right to remove any directors without having to assign any reason. The court found that the appointment of Felix was valid and lawful. Thus, the notices were accordingly issued lawfully and validly, and it followed that the resolutions that were passed were also valid (see paras 117–119 & 120–124).
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- D (8) The defendants' expert had verified the foreign documents relied on by the defendants and the position of the law in Spain in respect of, inter alia, Zed Worldwide's winding up or insolvency, and this included the position of Jordi as insolvency administrator. There was no reply or rebuttal report to the defendant's expert affidavit and expert report. This solidified the defendants' position regarding the authenticity of the documents and the state of affairs of Zed Worldwide. Hence, this made it difficult for the plaintiffs to challenge Zed Worldwide conduct which was based on conjecture rather than facts (see paras 125–127).
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[Bahasa Malaysia summary]

- G Plaintiff-plaintiff adalah pengarah-pengarah bagi defendan-defendan manakala sebuah syarikat Sepanyol yang dikenali sebagai Zed Worldwide Holdings SL ('Zed Worldwide') yang telah diisytiharkan tidak solven adalah pemegang saham tunggal defendan-defendan. Saham Zed Worldwide dalam defendan-defendan kemudiannya diambil alih oleh sebuah syarikat yang dikenali sebagai Newry Global Media SLU dan pengambilalihan ini telah disahkan oleh seorang individu bernama Jordi iaitu pentadbir insolvency Zed Worldwide. Melalui dua sijil kebenaran di bawah s 333 Akta Syarikat 2016 ('AS 2016'), Zed Worldwide telah melantik Felix Sanchez Echevarria ('Felix') dan seterusnya Chan Min En ('Chan') sebagai wakil-wakil korporatnya tetapi akhirnya, Chan meletak jawatan. Zed Worldwide juga telah melantik Felix sebagai pengarah tambahan defendan-defendan dan seterusnya memecat plaintiff-plaintiff daripada jawatan pengarah defendan-defendan. Dalam saman pemula semasa ('SP'), plaintiff-plaintiff memohon untuk membatalkan notis permohonan, notis mesyuarat agung luar biasa ('notis EGM') dan resolusi-resolusi yang diluluskan oleh Zed Worldwide ('lampiran 1'). Di samping itu, plaintiff-plaintiff juga telah memfailkan notis permohonan untuk pelbagai pelepasan injunksi dalam lampiran 3. Plaintiff-plaintiff telah
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mengemukakan bantahan awal ('BA') bahawa semua affidavit defendan-defendan yang difailkan dalam SP ini adalah tidak lengkap menurut A 41 k 12 daripada Kaedah-Kaedah Mahkamah 2012 ('KKM'). Ini adalah berdasarkan fakta bahawa affidavit defendan-defendan telah disahkan di hadapan notari awam di Sepanyol dan Sepanyol bukanlah sebuah negara komanwel, oleh itu, defendan-defendan sepatutnya mengesahkan affidavit-afidavit tersebut di hadapan pegawai konsular negara komanwel di Sepanyol. Isu-isu yang dibangkitkan dalam tindakan semasa ialah: (a) sama ada Jordi melantik Felix sebagai wakil korporat Zed Worldwide dan isu berkenaan bidang kuasa Felix; (b) sama ada defendan kedua telah mematuhi keperluan mandatori seperti yang dikehendaki oleh AS 2016 dalam memulakan EGM dan memecat plaintiff-plaintiff sebagai pengarah; dan (c) sama ada apa-apa ketidakpatuhan menyebabkan pengajuan EGM dan penyingkiran plaintiff-plaintiff tidak sah. Di samping isu-isu di atas, mahkamah juga telah mempertimbangkan isu-isu berhubung kegagalan untuk memasukkan Zed Worldwide sebagai pihak dalam tindakan semasa dan mengenai mandat yang bercanggah dalam melantik lembaga pengarah baharu iaitu antara Felix dan Chan. Akhirnya, mahkamah menyimpulkan kes ini dengan pemeriksaan isu utama berhubung sebab mengapa Zed Worldwide terpaksa memecat plaintiff-plaintiff sebagai pengarah defendan-defendan dan cara plaintiff-plaintiff disingkirkan yang menjurus kepada persoalan teras tentang keabsahan pelantikan Felix sebagai wakil korporat.

Diputuskan, menolak lampiran 1 dan lampiran 3 dengan kos sebanyak RM18,000:

- (1) Bantahan awal tersebut sememangnya merupakan satu pemikiran kemudian yang dibangkitkan pada saat-saat akhir yang bukan sahaja tidak adil kepada defendan-defendan tetapi adalah sesuatu yang defendan-defendan boleh perbetulkan dengan mudah jika ia dibangkitkan pada saat yang paling awal. Dengan kegagalan memberi notis BA pada masa yang paling awal, plaintiff-plaintiff dianggap telah mengetepikan hak mereka untuk berbuat demikian. Ketidakpatuhan kepada KKM tidak menyebabkan atau mengakibatkan ketidakadilan yang besar. Oleh itu, mahkamah menolak BA plaintiff-plaintiff dan memberikan kebenaran kepada defendan-defendan untuk menggunakan semua affidavit defendan-defendan tanpa mengira kecacatan yang diadukan oleh plaintiff-plaintiff (lihat perenggan 53–54).
- (2) Plaintiff-plaintiff sendiri secara khusus telah mencabar tindakan Felix yang bertindak bagi pihak Zed Worldwide. Selanjutnya, defendan-defendan hanyalah defendan nominal dan pemohon EGM ialah Zed Worldwide, sebagai pemegang saham tunggal. Relif-relif yang dimohon dalam tindakan semasa adalah terhadap Zed Worldwide sendiri. Oleh itu, Zed Worldwide sepatutnya menjadi parti kepada SP ini (lihat perenggan 59 & 61–63).

- A (3) Dua surat telah dikeluarkan oleh Jordi iaitu pada 8 April 2020 dan 14 April 2020. Dalam kedua-dua surat tersebut, Jordi mengesahkan, antara lain, kuasa Felix sebagai wakil korporat Zed Worldwide dalam defendan-defendan dan pelantikan Chan tidak menggantikan pelantikan Felix. Berkenaan dengan ketulenan surat, defendan-defendan telah mengemukakan sijil tandatangan digital yang dilampirkan pada surat-surat tersebut. Selanjutnya, plaintif-plaintif tidak dapat menunjukkan apa-apa bukti yang bertentangan untuk mencadangkan bahawa surat-surat tersebut tidak ditandatangani. Jelas sekali Jordi melantik Chan sebagai tambahan kepada Felix sebagai wakil korporat Zed Worldwide dan perakuan kebenaran kedua tidak menggantikan atau membatalkan pelantikan Felix. Oleh itu, tidak ada keperluan untuk Jordi mengeluarkan sijil baru bagi melantik Felix semula (lihat perenggan 78–79 & 84–85).
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- D (4) Berhubung dengan isu percanggahan mandat, pertamanya, bekas setiausaha syarikat tersebut tidak bertindak ke atas resolusi bertulis ahli yang diluluskan oleh Zed Worldwide (bertindak melalui Chan), justeru, isu tersebut telah menjadi akademik semata-mata. Kedua, memandangkan Jordi telah melantik Felix secara sah sebagai wakil korporat Zed Worldwide, Felix mempunyai kuasa yang diperlukan untuk meluluskan resolusi bertulis ahli bagi pihak Zed Worldwide. Lebih penting lagi, resolusi ini hanya diluluskan selepas peletakan jawatan Chan. Oleh itu, tidak akan ada apa-apa mandat yang bercanggah (lihat perenggan 92–93).
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- F (5) Berkenaan dengan isu mengenai kegagalan defendan kedua untuk mematuhi keperluan statutori, mahkamah mendapati bahawa isu ini tidak dihidang dalam mana-mana affidavit plaintif-plaintif dan hanya dibangkitkan melalui penghujahan. Atas alasan ini sahaja, hujah plaintif-plaintif sepatutnya ditolak. Walau apa pun, mahkamah mendapati bahawa plaintif-plaintif menyedari hasrat Zed Worldwide untuk meluluskan resolusi untuk memecat mereka sebagai pengarah. Oleh itu, tiada kejutan dan/atau prasangka yang ditimbulkan ke atas plaintif-plaintif. Memandangkan plaintif-plaintif mempunyai notis yang mencukupi mengenai EGM, ketidakpatuhan yang didakwa hanyalah ketidakaturan yang boleh diperbetulkan oleh mahkamah. Selanjutnya, tiada dakwaan pada affidavit-afidavit bahawa notis EGM disampaikan lambat apatah lagi ia disengajakan, oleh itu fakta bahawa ia disampaikan secara lambat tidak boleh membatalkan EGM atau membatalkan resolusi yang diluluskan ketika itu (lihat perenggan 101).
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- I (6) ‘Unanimous consent rule’ atau ‘*Duomatic* rule’ dalam *In Re Duomatic Ltd* [1969] 2 Ch 365 adalah terpakai di mana jika semua pengarah atau pemegang saham bersetuju dengan tindakan atau transaksi tertentu yang jujur dan intra vires syarikat, perkara yang dilakukan akan disahkan,

- walaupun pada hakikatnya perkara tersebut tidak dilakukan mengikut prosedur yang diperlukan. Zed Worldwide ialah pemegang saham tunggal yang sah bagi defendan-defendan dan memandangkan EGM telah dimohon oleh pemegang saham, terpulang kepada pemegang saham untuk mengetepikan atau menyetujui apa-apa ketidakaturan yang disebabkan oleh kekurangan notis atau notis singkat. Walaupun terdapat apa-apa ketidakaturan, mahkamah boleh memperbetulkannya di bawah s 582 AS 2016. Malah, dalam kes ini, tidak ada keperluan untuk memperbetulkan ketidakaturan tersebut kerana ia tidak menyebabkan ketidakadilan yang ketara atau apa-apa ketidakadilan (lihat perenggan 102–106). A B C
- (7) Notis-notis permohonan telah dikeluarkan oleh Felix bagi pihak Zed Worldwide, oleh itu, notis-notis tersebut telah dikeluarkan dengan betul mengikut s 311(2) AS 2016. Zed Worldwide juga memegang 100% pegangan saham dalam defendan-defendan seperti yang dikehendaki di bawah s 311(3), oleh itu, menurut s 312(1) AS 2016, plaintif-plaintif diwajibkan untuk memanggil mesyuarat ahli dalam tempoh 14 hari dari tarikh permohonan. Disebabkan kegagalan plaintif-plaintif untuk memanggil mesyuarat tersebut, Zed Worldwide berhak di bawah s 313(1) AS 2016 untuk menggunakan peruntukan bantuan diri untuk mengadakan mesyuarat ahli bagi meluluskan resolusi. Zed Worldwide kemudiannya mengeluarkan notis EGM dengan tempoh notis 14 hari mengikut s 316 AS 2016 dan perkara 60 perlembagaan defendan pertama. Akhirnya, Zed Worldwide telah meluluskan resolusi untuk memecat plaintif-plaintif sebagai pengarah defendan-defendan. Zed Worldwide memegang 100% pegangan saham dalam defendan-defendan dan mempunyai hak mutlak untuk memecat mana-mana pengarah tanpa perlu memberikan apa-apa sebab. Mahkamah mendapati pelantikan Felix adalah sah dan mengikut undang-undang. Oleh itu, notis-notis tersebut dikeluarkan dengan sewajarnya secara sah dan mengikut undang-undang, dan berikutan itu resolusi-resolusi yang diluluskan juga adalah sah (lihat perenggan 117–119 & 120–124). D E F G
- (8) Pakar defendan-defendan telah mengesahkan dokumen-dokumen asing yang dirujuk oleh defendan-defendan dan kedudukan undang-undang di Sepanyol berkenaan, antara lain, penggulungan atau insolvensi Zed Worldwide, dan ini termasuk kedudukan Jordi sebagai pentadbir insolvensi. Tiada jawapan atau laporan sanggahan kepada affidavit pakar dan laporan pakar defendan-defendan. Ini mengukuhkan lagi pendirian defendan-defendan mengenai keabsahan dokumen-dokumen tersebut dan keadaan hal ehwal Zed Worldwide. Oleh itu, ini menyukarkan plaintif-plaintif untuk mencabar tindakan Zed Worldwide di mana cabaran tersebut adalah berdasarkan sangkaan dan bukannya fakta (lihat perenggan 125–127).] H I

A Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770, CA (refd)

Bentley-Stevens v Jones and others [1974] 2 All ER 653; [1974] 1 WLR 638, Ch D (refd)

B

Browne v La Trinidad (1887) 37 Ch D 1, CA (refd)

Bukit Melita Sdn Bhd v Lam Geok Hee & Ors [1996] MLJU 227; [1996] 1 LNS 479; [1997] 4 AMR 3160, HC (refd)

China Investment Fund Co Ltd v Guang Sheng Investment Development Group Ltd & Ors [2016] HKCU 1395 (refd)

C

Cindee Development Sdn Bhd & Anor v Warrior Rubber Products (M) Sdn Bhd & Ors [2018] MLJU 376; [2017] 1 LNS 2020, HC (refd)

Duomatic Ltd, In Re [1969] 2 Ch 365, Ch D (folld)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)

D

Golden Plus Holdings Bhd v Teo Kim Hui & Ors [2021] 7 MLJ 852, HC (refd)

Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370, CA (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (refd)

E

Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd [2008] 3 MLJ 653, CA (refd)

Kok Zi Yao & Ors v LKT Ventures Sdn Bhd & Ors [2020] 11 MLJ 265, HC (refd)

La Compagnie de Mayville v Whitley [1896] 1 Ch 788, CA (refd)

F

Lim Choon Seng v Lim Poh Kwee [2020] 5 MLJ 587, FC (refd)

London Passenger Transport Board v Moscrop [1942] 1 ALL ER 97, HL (refd)

Malaysia Building Society Bhd v Univein Sdn Bhd [2002] 7 MLJ 501; [2002] 2 CLJ 81, HC (refd)

Pedley v Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307, HC (refd)

G

Portuguese Consolidated Copper Mines, Limited Ex Parte Badman Ex Parte Bosanquet, In Re [1890] 45 Ch D 16, CA (refd)

Seacera Group Berhad v Tan Wei Lian & Ors [2019] MLJU 930; [2019] 1 LNS 762, HC (refd)

H

Than Kau & Anor v Rhb Nominees (Asing) Sdn Bhd & Ors [2019] MLJU 920; [2019] 1 LNS 1271, HC (refd)

Unisoft Group Ltd (No 3), Re [1994] 1 BCLC 609, Ch D (refd)

Yeung Bing Kwong Kenneth v Mount Oscar Ltd [2019] HKCU 2413, CA (refd)

I Legislation referred to

Companies Act 2016 ss 101, 310, 311, 311(1), (2), (3), 312, 312(1), 313(1), 316, 333, 582

Rules of Court 2012 O 1A, O 2 r 1, O 2 r 3, O 41 r 12

Kelvin Ng (Lee Sze Ying with him) (Vin & Isaac Lee) for the plaintiffs.

Lee Shih (Kelvin Seah with him) (Lim Chee Wee Partnership) for the defendants.

A

Wan Muhammad Amin JC:

[1] This was an application by the plaintiffs by way of originating summons dated 18 June 2020 for, inter alia, the following reliefs:

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- (a) suatu deklarasi bahawa segala notis-notis rekuisasi ahli-ahli ('requisition notice of the members') bagi mengadakan mesyuarat agung luar biasa ('extraordinary general meeting') bertarikh pada 24 March 2020, 24 March 2020 dan/atau 27 March 2020 masing-masing ('notis-notis rekuisasi'), notis-notis mesyuarat agung luar biasa (extraordinary general meeting) bertarikh pada 7 April 2020, 7 April 2020 dan/atau 13 April 2020 masing-masing ('notis-notis EGM'), resolusi-resolusi ahli-ahli (member's written resolution) bertarikh 12 March 2020, 12 March 2020 dan/atau 30 March 2020 ('resolusi-resolusi ahli-ahli') kesemuanya adalah tidak sah dan batal.

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- (b) suatu deklarasi bahawa segala hasil daripada notis-notis rekuisasi, notis-notis EGM dan/atau resolusi-resolusi ahli-ahli, termasuk perantikan pengarah-pengarah Enrique Urbaneja Moreno, Christina Faci Lobera, Francisco Javier Andres Santamarina dan Mohamed Ariff Bin Tar Mohamed, perantikan setiausaha-setiausaha syarikat Eng Bee Hong dan Woo Chooi Yoke, penyingkiran plaintif-plaintif sebagai pengarah-pengarah defendan-defendan dan/atau penukaran penandatanganan diberikuasa kepada akaun-akaun Maybank syarikat defendan-defendan adalah tidak sah dan batal.

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- (c) suatu deklarasi bahawa segala hasil-hasil, notis-notis, langkah-langkah dan/atau tindakan-tindakan susulan dan/atau lanjutan yang telah dan/atau akan diambil oleh defendan-defendan, sama ada melalui diri sendiri, ejen-ejen, pengkhidmat-pengkhidmat, wakil-wakil atau mana-mana berkenaan dengan notis-notis rekuisasi, notis-notis EGM dan/atau resolusi-resolusi ahli-ahli adalah tidak sah dan terbatal.

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- (d) suatu perintah bahawa lembaga pengarah defendan-defendan adalah dihalang, samada melalui diri-sendiri, ejen-ejen, pengkhidmat-pengkhidmat, wakil-wakil, setiausaha syarikat ('company secretary') atau mana-mana berkenaan daripada mengambil sebarang langkah dan tindakan lanjut dan/atau susulan berkenaan dengan urusan-urusan syarikat sehingga perintah mahkamah ini selanjutnya.

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[2] Essentially the plaintiffs sought to declare invalid the notices of requisition and notices of extraordinary general meeting ('EGM notices') (referred to in para 1 of the originating summons (collectively 'the notices') and the resolutions passed).

I

[3] The plaintiffs sought to challenge the locus standi of a Spanish individual, Felix Sanchez Echevarria ('Felix'), whom represented himself as the

A authorised corporate representative ('corporate representative') of Zed Worldwide Holdings SL ('Zed Worldwide') to issue the notices and arising therefrom the validity of the notices, the extraordinary general meetings ('EGMs') that were held and/or various resolutions passed.

B THE SALIENT BACKGROUND FACTS

[4] The defendants are private limited companies incorporated in Malaysia on 12 March 2003 and 12 December 2001 respectively.

C [5] Zed Worldwide is, at all material times, the *sole shareholder* of both the defendants.

D [6] The first plaintiff was appointed as a director of the first defendant on 19 September 2016 and the second defendant on 30 December 2016.

[7] The second plaintiff was appointed as a director of the defendants on 2 March 2011.

E [8] The plaintiffs are *not* shareholders of the defendants.

Winding up/Voluntary insolvency of Zed Worldwide

F [9] On 17 October 2016, the Commercial Court No 9 of Madrid declared Zed Worldwide's voluntary insolvency. The Spanish Insolvency Court also appointed Jordi Albiol Plans ('Jordi') from Rousaud Costas Duran Concursal SLP ('RCD') as Zed Worldwide's sole insolvency administrator ('insolvency administrator').

G [10] As a result of this appointment, Jordi has the legal obligations, among others, to administer and dispose of Zed Worldwide's assets.

Purchase of Zed Worldwide's shares by Newry

H [11] On 3 December 2018, as part of the liquidation process, Zed Worldwide entered a deed of sale with a Spanish company known as Newry Global Media SLU ('Newry'). The deed of sale is to dispose of Zed Worldwide's assets, including its shares in the defendants, to Newry.

I [12] On 2 December 2019, the insolvency administrator, Jordi, issued a public notice confirming that Newry has acquired from Zed Worldwide *all* of its shares in the defendants.

Appointment of Felix as additional director of the defendants and Zed Worldwide's corporate representative

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[13] On 1 August 2019, Felix was appointed as an *additional director* of the defendants.

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[14] On 2 February 2020, Zed Worldwide (acting through Jordi) issued certificates of authorisation under s 333 of the Companies Act 2016 ('the CA 2016'), appointing Felix as Zed Worldwide's corporate representative in the defendants.

C

Plaintiffs' refusal to register the transfer of shares from Zed Worldwide to Newry

[15] On 4 February 2020, Zed Worldwide (acting through Jordi) and Newry (acting through its sole director, Felix) executed the necessary forms to transfer all Zed Worldwide's shares in the defendants to Newry.

D

[16] On 6 February 2020, RCD (acting through Jordi) issued a letter of confirmation confirming that Newry has acquired ZWH's shares in the defendants. Thus, effectively making Newry the beneficial owner of the defendants' shares.

E

[17] On 7 February 2020, the legal department of Newry submitted the executed instruments of transfer to the plaintiffs and the defendants' then company secretary. Newry sent an email to the first plaintiff attaching, inter alia:

F

- (a) Newry's notice, signed by Felix issued to the board of directors and company secretary informing the latter that Newry had acquired 100% shares in Zed Worldwide in connection with bankruptcy proceedings and the liquidation of Zed Worldwide and requesting for confirmation of the transfer of shares from Zed Worldwide to Newry within 24 hours;
- (b) a scanned copy of the deed of sale (English translation only);
- (c) a copy of credential of insolvency administration containing the court minutes of Jordi's acceptance of position as insolvency administrator on 10 November 2016 (English translation only); and
- (d) Jordi's letter of confirmation dated 6 February 2020 confirming that the present sole shareholder of the defendants is Newry.

G

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I

[18] However, the plaintiffs and the defendants' then company secretary refused to register the transfer without giving any reason.

A *Appointment of Chan as Zed Worldwide's corporate representative*

[19] On 9 March 2020, Zed Worldwide (acting through Jordi) issued another set of certificates of authorisation under s 333 of the Companies Act 2016 ('the CA 2016'), appointing Chan Min En ('Chan') as *another* corporate representative of Zed Worldwide in the companies. Chan subsequently resigned on 30 March 2020.

[20] On 14 April 2020, RCD (acting through Jordi) issued a letter, confirming that Chan's and Felix's appointments do not revoke or supersede one another but are meant to supplement and ease their respective exercise of powers.

D *Removal of the plaintiffs as directors and change of the defendants' company secretary*

[21] Zed Worldwide (acting through Felix) issued a notice dated 24 March 2020 to the plaintiffs to requisition for an EGM of both the defendants under ss 310 and 311(1) CA 2016 ('ZWH's 24 March 2020 requisition notices'). The proposed resolutions were for the removal of the plaintiffs as directors with immediate effect.

[22] After receiving ZWH's 24 March 2020 requisition notices, the plaintiffs *refused* to take any action to convene the EGM of members within the statutory period of 14 days.

[23] Instead, on 3 April 2020, the first plaintiff wrote to Jordi questioning Chan's and Felix's authority to requisition for an EGM for the defendants. In the same letter, the first plaintiff also requested Jordi to provide some documents, such as the status of Zed Worldwide and for proof that the transmissions of 100% shares from Zed Worldwide to Newry was legitimate.

[24] On 6 April 2020, the plaintiffs instructed the defendants' former solicitors to write to Jordi requesting information relating to the transmission of 100% shares in defendants in favour of Newry.

[25] On 7 April 2020, the first plaintiff (on behalf of the defendants) issued another letter to Felix, seeking confirmation, among others, as to whether Zed Worldwide is still legally subsisting.

[26] On 7 April 2020, Zed Worldwide (acting through Felix) issued notices to convene an EGM of both defendants to consider the removal of the plaintiffs as directors ('ZWH's 7 April 2020 EGM notices').

[27] On 8 April 2020, Jordi replied to the first plaintiff's letter dated 3 April 2020, confirming that Zed Worldwide (acting through RCD) did appoint Felix as Zed Worldwide's authorised corporate representative of the defendants.

A

[28] On 21 April 2020, the defendants' EGMs were carried out. Zed Worldwide (acting through Felix) resolved to remove the plaintiffs as directors of the defendants with immediate effect.

B

The first defendant's appointment of new directors and authorised bank signatory

[29] On 12 March 2020, Zed Worldwide (acting through Chan) passed a members' written resolution to appoint new directors for the first defendant. Further, Zed Worldwide (acting through Chan) authorised the first defendant's then company secretary to register the change with the Companies Commission of Malaysia within 14 days.

C

D

[30] However, the said second defendant's then company secretary failed, refused and/or neglected to register the appointment with the Companies Commission of Malaysia within the stipulated time.

E

[31] Therefore, on 30 March 2020, Zed Worldwide (acting through Felix) passed another members' written resolution, among others, to appoint new directors and a new authorised bank signatory for the first defendant.

F

[32] The appointment of new directors of the first defendant was registered with the Companies Commission of Malaysia on the same day.

The second defendant's appointment of new directors and authorised bank signatory

G

[33] On 12 March 2020, Zed Worldwide (acting through Chan) also passed another member's written resolution to appoint new directors for the second defendant. In that member's written resolution, Zed Worldwide (acting through Chan) also authorised the second defendant's then company secretary to register the appointment with the Companies Commission of Malaysia within 14 days.

H

[34] However, the said second defendant's then company secretary failed, refused and/or neglected to register the appointment with the Companies Commission of Malaysia within the stipulated time.

I

[35] On 27 March 2020, Zed Worldwide (acting through Felix) issued a notice to the plaintiffs to requisition for an EGM of the second defendant under ss 310 and 311(1) of the CA 2016 ('ZWH's 27 March 2020 requisition

A notice'). The proposed resolutions were, among others, to appoint new directors and a new authorised bank signatory for the second defendant.

B [36] Again, after receiving the ZWH's 27 March 2020 requisition notice, the plaintiffs refused to take any action to convene an EGM within the statutory period of 14 days.

C [37] Therefore, on 13 April 2020, Zed Worldwide (acting through Felix) issued a notice to convene an EGM of members to consider, among others, the appointment of new directors and a new authorised bank signatory for the second defendant. The EGM was scheduled to be held on 15 April 2020.

D [38] On 15 April 2020, the first plaintiff and the then company secretary attended the EGM of members, but they requested not to record their attendance. Zed Worldwide (acting through Felix) passed all the resolutions. The appointment of new directors was also registered with the Companies Commission of Malaysia.

E *Appointment of new company secretaries*

F [39] On 15 April 2020, after the defendants' EGM of members, the defendants then carried out their board of directors' meetings. Again, the first plaintiff and the former company secretary were present but requested not to record their attendance.

[40] During the meetings, the board of directors resolved to appoint new company secretaries to replace the then company secretary.

G [41] On 16 April 2020, Felix (in his capacity as one of the defendants' directors) wrote to the then company secretary, informing her that the board of directors has decided to remove her. Felix further requested her to consider resigning from her position. However, the then company secretary refused to accede to the request.

H [42] Therefore, on 21 April 2020, the defendants' board of directors passed a directors' circular resolution to remove the then company secretary from her position. The new company secretaries registered the change with the Companies Commission of Malaysia on the same day.

I *First legal proceedings commenced by the plaintiffs (Shah Alam High Court Originating Summons No BA-24NCC-40-04 of 2020)*

[43] On the same day as the second defendant's EGM, on 15 April 2020, the

plaintiffs herein commenced an action in the Shah Alam High Court Originating Summons No BA-24NCC-40-04 of 2020 (‘the SAHC Suit’) against the Zed Worldwide, Felix and Yip Huen Weng, the defendants herein and Chan. In the SAHC Suit, the plaintiffs sought for substantially the same reliefs they sought in this action. In the SAHC Suit the plaintiffs had also applied for interim injunctive reliefs by of notice of application dated 15 April 2020 with a certificate of urgency. The plaintiffs’ did not file any affidavit in the SAHC Suit nor is there any evidence that the defendants therein which includes the defendants herein were served or notified of the SAHC Suit.

[44] The plaintiffs subsequently withdrew the SAHC Suit.

[45] Two months later, on *18 June 2020*, the plaintiffs commenced this action but had excluded several defendants which were previously named in the SAHC Suit including Zed Worldwide. In this originating summons the plaintiffs sought to invalidate notices and resolutions passed by Zed Worldwide as follows:

- (a) regarding the removal of the plaintiffs’ from the first defendant:
 - (i) Zed Worldwide’s notice dated 24 March 2020 to requisition for an EGM of members under ss 310 and 311(1) of the CA 2016;
 - (ii) Zed Worldwide’s notice dated 7 April 2020 to convene EGM of members; and
 - (iii) Zed Worldwide’s resolutions passed at the EGM on 21 April 2020.
- (b) regarding the removal of the plaintiffs from the second defendant:
 - (i) Zed Worldwide’s notice dated 24 March 2020 to requisition for an EGM of members under ss 310 and 311(1) of the CA 2016;
 - (ii) Zed Worldwide’s notice dated 7 April 2020 to convene EGM of members; and
 - (iii) Zed Worldwide’s resolutions passed at the EGM on 21 April 2020.
- (c) regarding the first defendant’s appointment of new directors and a new authorised bank signatory:
 - (i) the member’s written resolution dated 12 March 2020, passed by Zed Worldwide, which was not registered with the Companies Commission of Malaysia; and
 - (ii) the member’s written resolution dated 30 March 2020 passed by Zed Worldwide.
- (d) regarding the second defendant’s appointment of new directors and a new authorised bank signatory:

- A (i) the member's written resolution dated 12 March 2020, passed by Zed Worldwide, which was not registered with the Companies Commission of Malaysia;
- B (ii) Zed Worldwide's notice dated 27 March 2020 to requisition for an EGM of members under ss 310 and 311(1) of the CA 2016;
- (iii) Zed Worldwide's notice dated 13 April 2020 to convene an EGM of members;
- C (iv) Zed Worldwide's resolutions passed at the EGM of members on 15 April 2020; and
- (v) any of the notices and/or resolutions mentioned in prayer (1) of this originating summons concerning the appointment of new company secretaries.
- D [46] Therefore, in summary the plaintiffs are challenging the events that have transpired and things done from the winding up or insolvency of Zed Worldwide to the appointment of Felix as Zed Worldwide's corporate representative to the eventual removal of the plaintiffs as directors of the defendants.
- E [47] Basically, the plaintiffs' do not recognise all the aforementioned conduct taken by Zed Worldwide in particular through Felix after Zed Worldwide's winding up or insolvency.
- F THE PLAINTIFFS' PRELIMINARY OBJECTION
- G [48] For the first time since this originating summons was filed, a preliminary objection was raised on behalf of the plaintiffs by their solicitors in the plaintiffs' written submissions dated 16 March 2021 (*encl 50*). This is surprising to say the least as not only was there no notice given to the defendants' of this objection but also because it does not give them an opportunity to respond or if needed, remedy, or cure any defect raised through the said preliminary objection. Notice of a preliminary objection should be given at the earliest possible moment (*Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501; [2002] 2 CLJ 81 — where the preliminary objections were raised by way of submissions).
- H [49] The plaintiffs' preliminary objection ('PO') was that *all* the defendants' affidavits filed in this originating summons were defective pursuant to O 41 r 12 of the Rules of Court 2012 ('the ROC') which provides as follows:
- Affidavit taken outside Malaysia admissible without proof of seal* (O 41 r 12)
- 12 A document purporting to have affixed or impressed thereon or subscribed

thereto the seal or signature of a Court, Judge, *notary public* or person having authority to administer oaths *in a Commonwealth country* and *in the case of any other country* the seal or signature of a *consular officer of a Commonwealth country* in testimony of an affidavit being taken before it or him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that Court, Judge, notary public or person. (Emphasis added.)

A

B

[50] The plaintiffs' PO is premised on the fact that the defendants' affidavits were affirmed before a notary public in Spain, Tomas Perez Ramos, and Spain is not a Commonwealth country. It was further argued on behalf of the plaintiffs that the defendants' affidavits should be affirmed before a consular officer of a Commonwealth country in Spain.

C

[51] Caught unfairly by surprise, learned counsel for the defendants submitted, *inter alia*, as follows:

D

- (a) the plaintiffs' PO was not raised at the earliest moment and prior notice was not given;
- (b) the plaintiffs' PO was only raised when the plaintiffs filed their first set of written submissions (*encl 50*);
- (c) the plaintiffs' PO was not raised when the defendants' affidavits were filed over a period of six months (six affidavits in total);
- (d) the plaintiffs had even replied to most of the defendants' affidavits and engaged in the exchange of affidavits; and
- (e) the defendants rely on O 2 r 3 of the ROC as well as O 1A of the ROC and O 2 r 1 of the ROC which reads as follows:

E

F

Order 2 rule 3 of the ROC:

A Court or Judge shall *not* allow any *preliminary objection* by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules *unless* the Court or Judge is of the opinion that such non-compliance has occasioned *a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both*.

G

H

Order 1A of the ROC:

In administering these Rules, the Court or a Judge shall have regard to the *overriding interest of justice* and not only to the *technical non-compliance* with these Rules.

I

Order 2 rule 1 of the ROC:

- (1) Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance

- A with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
- (2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective. (Emphasis added.)
- B
- C [52] Learned counsel for the defendants also submitted that if the court is of the view that the defendants should re-affirm their affidavits before a consular officer, that the defendants humbly seek leave of the court to allow the defendants to:
- D (a) use the existing affidavits at the hearing of this originating summons; and/or
- (b) to re-file the affidavits affirmed before a consular officer with the same contents within 14 days.
- E [53] I agreed with the abovementioned submissions by learned counsel for the defendants and dismissed the plaintiffs' PO. I further gave leave to the defendants' to use all the defendants' affidavits (namely *encls 15, 20, 27 and 42*) despite the defect complained of by the plaintiffs.
- F [54] In addition to what was submitted by learned counsel for the defendants I would further add as follows:
- G (a) in the plaintiff's reply affidavits to the defendants' affidavits (to those which they decided to reply to) the plaintiffs' never raised this PO nor did they even reserve their right to raise any preliminary objection when the plaintiffs' affirmed and filed their affidavits;
- H (b) in the last affidavit filed by the defendants which is the defendants' expert's affidavit, the plaintiffs had asked for a considerable extension of time to reply but in the end did not do so. The PO was not raised at that point either;
- I (c) the PO is indeed an afterthought raised at the last minute which was not only unfair to the defendants but is something the defendants could have easily remedied if it was raised at the earliest moment. This is demonstrated by the defendants willingness to do so as stated earlier;
- (d) by failing to give notice of the PO at the earliest moment the plaintiffs are deemed to have waived their right to do so (*Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1996] MLJU 227; [1996] 1 LNS 479; [1997] 4 AMR 3160); and

- (e) the non-compliance to the ROC did not cause or result in a substantial miscarriage of justice. A

FAILURE TO NAME ZED WORLDWIDE AS A PARTY

[55] It is very clear even from the reliefs that the plaintiffs sought that their main complaint is against the *acts of Zed Worldwide* as the sole shareholder of the defendants, which acts were performed through Felix. B

[56] In fact, in the plaintiffs' reply submissions dated 23 March 2021 (encl 55) the plaintiff specifically referred to paras 9, 10, 11 and 24 of the plaintiffs' affidavit in support (encl 2) which referred to the plaintiffs' complaint against the conduct of Felix on behalf of Zed Worldwide. C

[57] The plaintiffs seem to recognise this when they filed the SAHC Suit but have, for reasons best known to them, decided not to name Zed Worldwide as a party to this originating summons as they did in the SAHC Suit. D

[58] It must first be emphasised that the plaintiffs have taken the following position: E

- (a) the plaintiffs do not recognise the appointment of Felix (as corporate representative of the Zed Worldwide);
- (b) the plaintiffs do not recognise the actions taken by Felix (as corporate representative of the Zed Worldwide) on behalf of the Zed Worldwide including the notices issued by him for and on behalf of Zed Worldwide; F
- (c) the plaintiffs do not recognise the winding up or insolvency of Zed Worldwide and that its assets and shares have been purchased by Newry; and G
- (d) however, the plaintiffs do and must *recognise* that Zed Worldwide is the sole shareholder of the defendants. In connection to this s 101 of the CA 2016 provides as follows:

In the absence of evidence to the contrary, the entry of the name of a person in the register of members as shareholder is *prima facie* evidence that legal title to the share is vested in that person. H

[59] Therefore, it is evident that at the very least Zed Worldwide ought to be made a party not to mention Felix as the corporate representative of Zed Worldwide since the plaintiffs themselves have specifically challenged Felix conduct acting on behalf of Zed Worldwide. I

A [60] In this regard learned counsel for the defendants submitted that it is a common practice where an aggrieved party wishes to challenge an act of a shareholder, that shareholder must be named as a defendant in the proceedings. The following legal authorities were cited:

B (a) *Golden Plus Holdings Bhd v Teo Kim Hui & Ors* [2021] 7 MLJ 852 concerning a dispute over the validity of the notice to convene extraordinary general meeting of the company issued by the first to third defendants (shareholders);

C (b) *Than Kau & Anor v Rbb Nominees (Asing) Sdn Bhd & Ors* [2019] MLJU 920; [2019] 1 LNS 1271 involving a dispute over the validity of a notice to convene the extraordinary general meeting of the third defendant (company which was added as a nominal defendant) issued by the first and second defendants (shareholders); and

D (c) *Cindee Development Sdn Bhd & Anor v Warrior Rubber Products (M) Sdn Bhd & Ors* [2018] MLJU 376; [2017] 1 LNS 2020 concerning a dispute over the resolutions passed by the defendants shareholders at the extraordinary general meeting of the first defendant (the company that was added as a nominal defendant).

E [61] Based on the above authorities the defendants were mere nominal defendants. The *requisitioner* of the EGMs is Zed Worldwide, as the sole shareholder. The resultant resolutions that were passed at the EGMs were by votes exercised by Zed Worldwide. It is therefore crucial that Zed Worldwide be made a party.

G [62] Further, the reliefs sought in this originating summons were to, inter alia, declare the notices and subsequent steps taken by Zed Worldwide following the passing of the resolutions void. That being the case the reliefs sought are in fact *against Zed Worldwide* itself.

H [63] Therefore, Zed Worldwide should have been made a party to this originating summons.

I [64] What is evident to me is that the plaintiffs appear to be confused with the defendants role in this matter. The defendants are not the requisitioner of the EGMs, it is a *member's* or *shareholder's* requisition for an EGM (pursuant to s 310 read together with s 311 of the CA 2016) and *not* the defendants per se. There is a difference. I will deal with this in more detail later in this judgment. However, suffice to say and bears repeating that the plaintiffs complaint is against the acts of Felix on behalf of Zed Worldwide and that goes to the *validity* of the *acts of Zed Worldwide* itself.

[65] In *London Passenger Transport Board v Moscrop* [1942] 1 All ER 97 at p 104 it was held:

... the present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, *but, on the other hand, the persons really interested were not before the court* ... the courts have always recognised that *persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence*, and that, except in very special circumstances, *all persons interest should be made parties*, whether by representation orders or otherwise, *before a declaration by its terms affecting their rights is made* ... (Emphasis added.)

[66] Further, the Federal Court in *Lim Choon Seng v Lim Poh Kwee* [2020] 5 MLJ 587, reiterated the general rule that no orders can be made in respect of the non-party and held:

[70] ... *the general rule is that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party*: see *Kheng Chwee Idan v Wong Tak Thong* [1983] 2 MLJ 320 where Seah FJ delivering the judgment of the former Federal Court said:

In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (Brydges v Bydges & Wood; Re Shephard and Coleman). The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (see para 501 of Halsbury's Law of England (4th Edn) Vol 26 at p 237). (Emphasis added.)

[67] Hence, on this ground alone this originating summons can be dismissed. Nevertheless, for the purpose of completeness, I have also considered the other grounds relied on by the plaintiffs to support this originating summons and will deal with them below.

ISSUES RAISED BY THE PLAINTIFFS FOR DETERMINATION

[68] It is the plaintiffs' contention that in this originating summons the court needs to determine the following issues:

- (a) whether based on the affidavit documents, one can answer positively that Jordi on behalf of Zed Worldwide, had in fact at any time appointed Felix as the ACR (authorised corporate representative) ('corporate representative') of Zed Worldwide;
- (b) if yes, whether Felix, at the time of the issuance of requisition notices and notices for EGM and passing of the ordinary resolutions in the capacity of corporate representative of Zed Worldwide, had the authority to do so;

- A** (c) whether the second defendant had complied with the mandatory requirements as required by the Companies Act 2016 ('the CA 2016') in convening the EGM and removing the plaintiffs as the directors; and
- (d) whether any non-compliance renders the convening of EGM and removal of the plaintiffs invalid.
- B**

[69] Issues (c) and (d) are based on the argument that:

- (a) the EGM notice was issued on 7 April 2020 and the EGM was convened on 21 April 2020; and
- C** (b) no special notice was issued for the removal of the plaintiffs from the board of directors.

- D** [70] In submitting on the above issues, learned counsel for the plaintiffs have also raised other matters or arguments which were not, with the utmost respect, relevant to the issues raised.

- E** [71] Some of the above issues raised overlap whilst others are actually repetitive and simply phrased in different way but are essentially the same issue. That being the case I have decided to deal with some of them collectively.

WHETHER JORDI APPOINTED FELIX AS ZED WORLDWIDE CORPORATE REPRESENTATIVE AND THE ISSUE OF FELIX'S AUTHORITY

- F** [72] Learned counsel for the plaintiffs submitted that Jordi had issued two certificates of authorisations appointing two corporate representative of Zed Worldwide as follows:

- G** (a) on 2 February 2020 appointing Felix as the corporate representative ('first certificate') pertaining to the affairs of the defendants; and
- (b) on 9 March 2020 appointing Chan as the corporate representative ('second certificate') pertaining to the affairs of the defendants.

- H** [73] It was further argued by learned counsel for the plaintiffs that the first certificate revoked the appointment of Felix and it was superseded by Chan's appointment based on the wording of the first certificate which states, *inter alia*, as follows:

- I** Such appointment shall remain in force until revoked by ZED WORLDWIDE HOLDINGS, S.L., or through the Insolvency Administrator in writing *or by the issue of a subsequent* Certificate of Appointment of Authorised Corporate Representatives to ZED MOBILE MALAYSIA SDN. BHD. This Authorisation shall supersede any previous authorisation (whether in writing or orally) dated before 2 February, 2020. (Emphasis added.)

[74] An identical first certificate was issued in respect of the second defendant. A

[75] In response to this argument, learned counsel for the defendants submitted that Jordi did *not* intend to revoke or supersede Felix's authority as Zed Worldwide's corporate representative. Instead, Jordi appointed Chan so that both Felix and Chan could *supplement* and ease their respective exercise of power. This is obvious based on the comparison of the wording used in the second certificate which states, inter alia, as follows: B

Such appointment shall remain in force until revoked by ZED WORLDWIDE HOLDINGS, S.L., or through the Insolvency Administrator in writing or by the issue of a subsequent Certificate of Appointment of Authorized Corporate Representatives to ZED MOBILE MALAYSIA SDN. BHD. C

[76] An identical second certificate was issued in respect of the second defendant. D

[77] The last paragraph of the first certificate does *not* appear or was removed in the second certificate which learned counsel for the defendants argued means Jordi has never intended to revoke or supersede Felix's authority via Chan's appointment. E

[78] Further, two letters were issued by Jordi, respectively, on 8 April 2020 and 14 April 2020. In both letters, Jordi confirmed, among others, Felix's authority as Zed Worldwide's corporate representative in the defendants and Chan's appointment does not supersede Felix's appointment. F

[79] It is clear to me that Jordi appointed Chan in addition to Felix as Zed Worldwide's corporate representative and that the second certificate does not supersede or revoke Felix's appointment. G

[80] The plaintiffs then proceeded to challenge Jordi's letters dated 8 April 2020 and 14 April 2020 which the plaintiffs argue are not authentic at the time of their issuance. H

[81] However, the first plaintiff has never denied (and is therefore deemed to admit) receiving Jordi's letter dated 8 April 2020. More importantly, Jordi's letter was to reply to the first plaintiff's letter dated 3 April 2020. It is, therefore, evident that Jordi had received the first plaintiff's letter and issued this reply letter and this puts these issues to rest. I

[82] If the plaintiffs had any doubts about the authenticity of Jordi's letter dated 8 April 2020, they could have issued another letter to Jordi for

A clarification or challenged Jordi (or the author of the letter if it was indeed other than Jordi) to prove its authenticity. However, they did not do so.

B [83] The plaintiffs have also never deposed in their affidavit in reply 1 (*encl 16*) that Jordi's letter dated 8 April 2020 that they received was unsigned nor did the plaintiffs exhibit the purported unsigned copy they allegedly received. However, the plaintiffs only now raise this issue by way submissions, which I am inclined to agree with the defendants, is an afterthought.

C [84] Moreover, there is no reason for the plaintiffs to question the authenticity of Jordi's letters. The defendants have produced the digital signature certificates attached to both letters, which clearly show that Jordi signed both letters at that material time. On the other hand, the plaintiffs could not show any contrary evidence to suggest that the letters were unsigned. A
D bare assertion carries no evidential value (*Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301.)

E [85] Still dissatisfied, the plaintiffs then contended that Jordi did not issue a new certificate to re-appoint Felix in view that Felix's appointment has been superseded. Such an argument is devoid of merit and as stated earlier Jordi has never intended to supersede or revoke Felix's authority through Chan's appointment. At all material times, Jordi's intention is consistent with what he had said in his letter dated 14 April 2020. As such, there is no necessity for Jordi
F to issue a new certificate appointing Felix again.

G [86] Further, in Chan's letter to Felix dated 30 March 2020, Chan took cognisance that Felix was holding the same position (ie as Zed Worldwide's corporate representative) like her which fact was known to the former company secretary. Chan further said that it is unnecessary for her to continue holding such position at that material time. An excerpt of Chan's letter of 30 March 2020 is reproduced below:

H As you know, I have been appointed as ACR pursuant to Section 333 of the Malaysian Companies Act 2016, but since you are holding the same position like me and the Malaysian companies' Company Secretary asked you to become the one and only channel of communication with her, I think that it is completely unnecessary for me to go on holding such a position at this stage, hence the reason I am resigning.

I [87] Thus Jordi, Felix, Chan and the former company secretary were aware that there were two corporate representatives of Zed Worldwide in the defendants at that material time. It is hence ironic that only the plaintiffs seems to be in the dark about this or rather that they chose to be.

[88] I found it incredulous of the plaintiffs to challenge every aspect of Jordi's confirmation regarding Felix and Chan's appointment as corporate representative of Zed Worldwide.

A

[89] On the one hand the plaintiffs questioned the validity of such appointment but when proof and an explanation is given to them, the plaintiffs then challenge almost every aspect of the explanation. In other words, it appears that the plaintiffs are challenging Jordi's own decision to appoint the corporate representatives, Felix and Chan, and the manner he appointed them.

B

[90] This is not only unreasonable but also questions the motives of the plaintiffs' in mounting this blatant challenge.

C

CONFLICTING MANDATES IN APPOINTING NEW BOARD MEMBERS

D

[91] The plaintiffs' argued that there were similar ordinary resolutions passed on two different occasions, and therefore, it raises doubt as to who has the real authority.

E

[92] Firstly, the former company secretary did not give any effect to the member's written resolutions passed by Zed Worldwide (acting through Chan) on 12 March 2020. Therefore, the issue is purely academic. In *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307 it was held as follows:

F

The power of the court to make a declaratory judgment is discretionary. The court will not make a declaratory judgment when the question raised is purely academic. The court should not be required 'to answer academic questions' — *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, ie relieve him from any liability or disadvantage or difficulty: *Thorne Rural District Council v Bunting* [1972] 1 All ER 439.

G

I find that the declaration prayed for is purely academic. *The plaintiff is not going to benefit in any way from the declaration. He is not asking for any consequential relief. He is only asking for a declaration of a mere legal right* (Emphasis added.)

H

[93] Secondly, since Jordi had validly appointed Felix as Zed Worldwide's corporate representative, Felix has the requisite authority to pass the member's written resolutions on behalf of Zed Worldwide. More importantly, these resolutions were only passed after Chan's resignation. Therefore, there could not be any conflicting mandates.

I

A THE SECOND DEFENDANT'S FAILURE TO COMPLY WITH
STATUTORY REQUIREMENTS

B [94] It was the plaintiffs' submission that the second defendant had failed to
comply with the mandatory statutory requirements in convening the EGM
and removing the plaintiffs as the directors of the second defendant. In this
regard the plaintiffs alleged that:

- C (a) the EGM notice of the second defendant did not meet the mandatory
14 days' notice period as required by the CA 2016; and
(b) the second defendant has failed to issue special notice to the plaintiffs.

[95] This is because:

- D (a) Felix issued the EGM notice of the second defendant to remove the
plaintiffs as directors on 7 April 2020; and
(b) the EGM was convened on 21 April 2020.

E [96] In this regard, there was short service of *one day*.

[97] Section 316 of the CA 2016 provides as follows:

Notice required for meetings of members

- F (1) A meeting of members of a private company, other than a meeting for the
passing of a special resolution, shall be called by notice of at least fourteen days or
any longer period specified in its constitution.

G [98] Learned counsel for the plaintiffs cited the case of *Kok Zi Yao & Ors v
LKT Ventures Sdn Bhd & Ors* [2020] 11 MLJ 265 in support of his argument
that the day of service of the EGM notice as well as the day of EGM are to be
excluded and the failure to adhere to the s 316 of the CA 2016 is not a mere
procedural irregularity and is not curable and must be strictly adhered to.

H [99] Again, this argument advanced on behalf of the plaintiffs was not found
in any of the plaintiffs' affidavits filed in this originating summons.

[100] It is also raised by way of submissions similar to the plaintiffs' PO.

I [101] I rejected this issue raised by the plaintiffs and agreed with the
submissions advanced on behalf of the defendants based on the following
reasons:

- (a) this issue was not pleaded in any of the plaintiffs' affidavits and only
raised by way of submissions. As this is a factual issue the plaintiffs must

- raise it through their affidavit(s) and failure to do so is fatal to their case. An objection or argument such as this must be specifically pleaded and cannot be allowed to be raised by way of submissions. On this ground alone the plaintiffs' argument ought to be rejected; A
- (b) further and in any event the plaintiffs had sufficient notice of the EGM. The plaintiffs were aware of Zed Worldwide's intention to pass the resolutions to remove them as directors. Hence, there was no surprise and/or prejudice occasioned to the plaintiffs. The following facts substantiates this point: B
- (i) the plaintiffs received a copy of the notice dated 24 March 2020 to requisition for an EGM under ss 310 and 311(1) of the CA 2016 from Zed Worldwide. The said requisition notice clearly sets out the business of the meeting (ie to remove the plaintiffs as directors); and C
- (ii) the first plaintiff referred to the said requisition notice in his letter to Jordi dated 3 April 2020. D
- (c) since the plaintiffs had sufficient notice of the EGM, the purported non-compliances are merely irregularities that this court may cure; E
- (d) in the English case of *Browne v La Trinidad* (1887) 37 Ch D 1 the notice was given less than ten minutes before the time of holding it. However, the plaintiff did not object to it. 'He took no notice of the matter. He did not say that it was inconvenient for him to attend, and *he did not ask the directors to adjourn it*. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, *nor until four days before the meeting*'. It was further held that: F
- ... It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and *the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment*. In such cases *the court never interferes*. I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, *where the irregularity complained of can be set right at any moment*. (Emphasis added.) G
- (e) *Browne* was referred to by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 where it was accepted that where there was a deliberate or intentional act or omission to exclude the director to attend the meeting then the decisions made at the board meeting was a *nullity or invalid*. However, if it was not deliberate or unintentional then it is a mere *irregularity* that can be cured (*Bentley-Stevens v Jones and others* [1974] 2 All ER 653 ; [1974] 1 WLR 638; *In Re Portuguese Consolidated Copper Mines, Limited Ex Parte Badman Ex Parte Bosanquet* [1890] 45 Ch D I

- A 16; *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788);
- (f) in the present case, there is not even an allegation on affidavit that the EGM notice was short served let alone that it was deliberate, therefore the fact that it was short served *cannot* invalidate the EGM or nullify the resolutions passed thereat; and
- B (g) I cannot stress enough that the plaintiffs could have raised their concern, if the genuinely had any, before the EGM on 21 April 2020 but did not do so until submissions were filed in this originating summons. It must be mean the plaintiffs had no objection to the short service of one day
- C (*Browne*).

[102] Additionally, the ‘unanimous consent rule’ or ‘*Duomatic rule*’ in *In Re Duomatic Ltd* [1969] 2 Ch 365 is applicable in that if all directors or shareholders agree to a particular course of conduct or transaction which is honest and intra vires the company, the matter done will be upheld, notwithstanding the fact that the matter was not done in the required form. The ‘*Duomatic rule*’ was applied by the Court of Appeal in *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237.

E [103] Zed Worldwide is the sole legal shareholder of the defendants and since the EGM was requisitioned by the shareholder, it is up to the shareholder to waive or accent to any irregularities for lack of notice or short notice.

F [104] The shareholder is the most appropriate person to decide what is best for him, be it the removal of existing directors or appointment of new directors (*China Investment Fund Co Ltd v Guang Sheng Investment Development Group Ltd & Ors* [2016] HKCU 1395; *Seacera Group Berhad v Tan Wei Lian & Ors* [2019] MLJU 930; [2019] 1 LNS 762).

G [105] Even if there are any irregularities (be it the lack of special notice or short notice), the court may cure them under s 582 of the CA 2016 which reads as follows:

H (1) *No* proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time *unless* the Court is of the opinion that *substantial injustice* has been or may be caused which cannot be remedied by any order of the Court.

I (2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency. (Emphasis added.)

[106] Therefore, there is no necessity to cure the irregularity where it did not cause substantial injustice or any injustice as in this present case.

OTHER PERIPHERAL ISSUES RAISED BY THE PLAINTIFFS

A

[107] It seems to me that the plaintiffs have been rather inconsistent in their stand and have been traversing many issues to argue their case. In doing so the plaintiffs have raised unpleaded issues and some in my respectful view, unnecessary ones as well which gave the impression that the plaintiffs are grasping at straws.

B

[108] Amongst the 'new' arguments raised is that Felix has not acted in good faith and has passed ordinary resolutions that prejudice the defendants' interest. In short, the complaints are against Felix's conduct as the defendants' director and as Zed Worldwide corporate representative.

C

[109] This is not relevant to the issue at hand and is not related to the reliefs that were sought in this originating summons bearing in mind that Felix was also not made a party to this originating summons when he was the one who issued the notices on behalf of Zed Worldwide.

D

[110] As such I do not find it necessary to deal with this issue.

E

[111] In any event Felix being appointed as the corporate representative and director is the absolute right and prerogative of the shareholder, Zed Worldwide (*Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609).

F

[112] The plaintiffs also made an issue of Chan's resignation and questioned it. This again is detached from the issues arising from the reliefs sought in the originating summons and are thus irrelevant.

CONCLUSION

G

[113] The main issue, however, which for some reason has been side stepped is the question of why Zed Worldwide resorted to removing the plaintiffs as directors of the defendants and the manner in which the plaintiffs' were removed. This also goes to the core question of the validity of Felix's appointment as corporate representative.

H

[114] First and foremost, it must be remembered as stated earlier in this judgment that on 7 February 2020, the legal department of Newry submitted the executed instruments of transfer to the plaintiffs and the defendants' then company secretary. However, the plaintiffs and the then company secretary refused to execute the transfer.

I

[115] This then led to Zed Worldwide to issue the requisition notices of 24

A March 2020 under s 310 read together with s 311 of the CA 2016.

[116] Under s 310 of the CA 2016, a meeting of *members* may be convened by the board *or* by any *member* holding at least 10% shareholding of a company. Here, Zed Worldwide is holding 100% shareholding in the defendants.

B

[117] The requisition notices of 24 March 2020 contained the general nature of the business to be dealt with at the meeting (ie the removal of the plaintiffs) and they were signed by Felix on behalf of Zed Worldwide. Therefore, the requisition notices of 24 March 2020 were properly issued and in compliance with the procedural requirements under s 311(2) of the CA 2016.

C

[118] Further, since Zed Worldwide holds 100% shareholding in the defendants, it has satisfied the requirement under s 311(3) of the CA 2016. The *plaintiffs* are obliged to call for a meeting of members within 14 days from the date of the requisition (s 312(1) of the CA 2016).

D

[119] However, the *plaintiffs* did *not* do so within the statutory 14 days' period in breach of s 312(1) of the CA 2016. This has its repercussions under CA 2016. Therefore, Zed Worldwide was entitled to resort to the self-help provision to convene members' meeting to pass the resolutions. Zed Worldwide could resort to s 313(1) of the CA 2016 where the directors have failed to call for a meeting of members under s 312 of the CA 2016.

E

F [120] The right to convene a meeting must be unfettered as it equates with a shareholder's right to vote. The Court of Appeal in the case of *Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd* [2008] 3 MLJ 653 (CA) also held that the right of shareholders to convene a meeting is valuable.

G [121] Zed Worldwide (acting through Felix) then issued the EGM notices of 7 April 2020 with 14 days' notice period. This is consistent with s 316 of the CA 2016 and article 60 of the first defendant's constitution, which reads as follows:

H A meeting called for the passing of a Special Resolution shall be called by twenty-one days' notice in writing at the least. *Any other meeting of the Company shall be called by fourteen days' notice in writing at the least.* Provided that a meeting of the Company shall, notwithstanding that it is called by shorter notice than that specified in this Article, be deemed to have been duly called if it is so agreed by all the members entitled to attend and vote at such meeting. (Emphasis added.)

I

[122] On 15 April 2020, ZWH passed the resolutions to remove the plaintiffs as directors of the defendants. It is worth repeating that Zed Worldwide holds 100% shareholding in the defendants and has the absolute right to remove any directors without having to assign any reason (Hong Kong Court of Appeal's

case of *Yeung Bing Kwong Kenneth v Mount Oscar Ltd* [2019] HKCU 2413).

A

[123] I can find no fault in the appointment of Felix as the corporate representative of Zed Worldwide and I have held it to be valid and lawful.

[124] Thus, the notices were accordingly issued lawfully and validly and it follows that the resolutions that were passed were also valid.

B

[125] I would further add at this juncture that the defendants had engaged an expert, Gonzalo Cerón Hernández, a lawyer from Spain whom had rendered an expert report and affirmed an affidavit (*encl 42*) to, inter alia, verify the foreign documents relied on by the defendants and the position of the law in Spain in respect of, inter alia, Zed Worldwide's winding up or insolvency, and this includes the position of Jordi of RCD as insolvency administrator which position appear to be similar to that of a liquidator in Malaysia.

C

D

[126] There was no reply or rebuttal report to the defendant's expert affidavit and expert report. This solidified the defendants' position regarding the authenticity of the documents and the state of affairs of Zed Worldwide.

E

[127] Hence, this made it difficult for the plaintiffs' to challenge Zed Worldwide conduct which was based on conjecture rather than facts.

[128] For the above reasons, I dismissed this originating summons in encl 1 including the plaintiffs' notice of application for various injunctive reliefs in encl 3 and after hearing arguments on costs, awarded costs of RM18,000 in favour of the defendants which costs included the costs of encl 3.

F

Enclosures 1 and 3 dismissed with costs of RM18,000.

G

Reported by Dzulqarnain Ab Fatar

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